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Pengusaha, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v Badrul Zaman bin PS Md Zakariah

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-21–09 OF 2014(W)
ZULKEFLI PCA, HASAN LAH, RAMLY ALI, ZAHARAH IBRAHIM AND BALIA YUSOF FCJJ
5 APRIL 2018

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Criminal Law — Internal Security Act (Malaysia) — Sections 8B(1) and 8C — Respondent sued authorities for damages for false imprisonment after High Court ruled his extended detention under ISA after serving initial two-year term was unlawful and unconstitutional — Deputy Home Minister had made the order under s 8(7) of the ISA for the extended detention — Whether joint reading of ss 8B(1) and 8C of the ISA precluded court from hearing any matter relating to or arising out of any act done or decision made by, inter alia, the Minister under the Act — Whether High Court and Court of Appeal had wrongly assumed jurisdiction and entertained respondent's claim/appeal — Whether entire proceedings before both aforesaid courts and decisions and orders made by them were nullities

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As the respondent's initial detention period of two years under the Internal Security Act 1960 ('the ISA') neared its end, the second appellant issued an order under s 8(7) of the ISA extending the detention period for a further two years. Aggrieved by the order, the respondent applied to the High Court for a writ of habeas corpus. The High Court ruled that the respondent's extended detention was unlawful and unconstitutional and ordered his release. The respondent thereupon sued the appellants for damages for falsely imprisoning him for about 300 days under the extension order. The High Court allowed his claim and awarded him RM3m as general damages and RM300,000 as exemplary damages. On the appellants' appeal against the decision, the Court of Appeal ('the COA') affirmed the finding on liability but set aside the awards for damages and replaced them with a single award of RM300,000 as general damages. Not satisfied with the decision, the appellants sought, and were granted, leave to file the instant appeal on the questions whether: (a) on a true construction of ss 8B(1) and 8C of the ISA, the court had jurisdiction to award the respondent the damages for false imprisonment; and (b) whether it was not wrong of the appellants to have raised for the first time before the COA the argument that the joint reading of those two sections of the ISA denied the court of any jurisdiction to award the damages (when that point had not been raised or argued before the High Court). In the instant case, the COA had apparently refused to allow the appellants to argue the point as they had not

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raised it as a ground of appeal. The appellants' argument was that the combined effect of ss 8B(1) and 8C of the ISA was to oust the jurisdiction of the court to review any act done or decision made by the Yang di-Pertuan Agong or the Minister in exercise of their discretionary power under the ISA (except on any question of procedural non-compliance) and that a 'judicial review' proceeding would include 'any other suit, action or other legal proceedings relating to or arising out of any act or decision made by the Yang di-Pertuan Agong or the Minister in accordance with the Act'. The appellants argued that the respondent's claim for damages for false imprisonment was caught by those provisions and could not be entertained by the courts. The COA, however, held that by applying the *ejusdem generis* rule, s 8B(1) was only concerned with direct challenges to the validity of a detention order by way of a 'judicial review' proceeding and did not affect a suit for damages that arose from a writ of habeas corpus proceeding where the detention was held to be unlawful and unconstitutional.

Held, allowing the appeal and setting aside the decisions and orders of the courts below:

(1) The proceedings as well as the decisions and orders of the High Court and the COA were null and void and of no effect and could not be allowed to stand (see para 54).

(2) On a true construction of ss 8B(1) and 8C of the ISA, the court had no jurisdiction to award damages for the tort of false imprisonment against the Minister for Home Affairs. The respondent's claim relied on the alleged wrongful or unlawful extended detention pursuant to an order issued by the second appellant under s 8(7) of the ISA. The cause of action for the tort of false imprisonment clearly fell under the category of proceedings instituted by way of 'any other suit, action or other legal proceedings relating to or arising out of any act or decision made by the Yang di-Pertuan Agong or the Minister in accordance with the Act' as provided for in the definition of 'judicial review' under s 8C(d) of the ISA. The act or decision complained of also fell under the category of 'any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act' as provided for in s 8B(1) of the ISA. By the clear words of s 8B(1), the court had no jurisdiction to deal with the respondent's claim. The respondent's action had nothing to do with 'any question on compliance with any procedural requirement' under the ISA. Therefore, the respondent's contention that s 8B(1) addressed only direct challenges to the validity of a detention order by way of judicial review, but not a suit for damages arising from a judicial review proceeding, failed (see paras 51–53).

(3) The courts had the discretion to allow a question of law to be raised for the first time on appeal where it involved the fundamental question of

jurisdiction and where the interests of justice so required. In the instant case, r 18(2) of the Rules of the Court of Appeal 1994 permitted the COA to allow the appellant to raise for the first time a new point not raised below, more so when the point raised involved the jurisdiction of the court to deal with the respondent's claim against the appellants (see paras 18, 21, 27 & 53).

[Bahasa Malaysia summary

Memandangkan tempoh tahanan permulaan responden selama dua tahun di bawah Akta Keselamatan Dalam Negeri 1960 ('Akta') hampir kepenghujungnya, perayu kedua mengeluarkan perintah di bawah s 8(7) Akta melanjutkan tempoh penahanan bagi dua tahun selanjutnya. Tidak berpuas hati dengan perintah tersebut, responden memohon kepada Mahkamah Tinggi untuk writ habeas corpus. Mahkamah Tinggi memutuskan bahawa penahanan lanjutan responden adalah menyalahi undang-undang dan tidak berperlembagaan dan memerintahkan pelepasannya. Responden dengan itu menyaman perayu-perayu bagi ganti rugi kerana secara salah memenjarakannya untuk kira-kira 300 hari di bawah perintah lanjutan tersebut. Mahkamah Tinggi membenarkan tuntutannya dan memberi award RM3 juta sebagai ganti rugi am dan RM300,000 sebagai ganti rugi teladan. Atas rayuan perayu-perayu terhadap keputusan tersebut, Mahkamah Rayuan ('MR') menegsahkan dapatan atas liabiliti tetapi mengenepikan award-award bagi ganti rugi dan menggantikannya dengan award tunggal sebanyak RM300,000 sebagai ganti rugi am. Tidak puas hati dengan keputusan tersebut, perayu-perayu memohon, dan diberikan, izin untuk memfailkan rayuan ini atas soalan-soalan sama ada: (a) atas tafsiran betul ss 8B(1) dan 8C Akta, mahkamah mempunyai bidang kuasa untuk mengawardkan responden ganti rugi bagi penahanan salah; dan (b) sama ada ia adalah salah perayu-perayu membangkitkan pada kali pertama di hadapan MR hujahan bahawa pembacaan bersama kedua-dua seksyen Akta tersebut menafikan mahkamah terhadap apa-apa bidang kuasa untuk mengaward ganti rugi (apabila poin ini tidak dibangkitkan atau dihujahkan di hadapan Mahkamah Tinggi). Dalam kes ini, MR dengan jelas enggan membenarkan perayu-perayu untuk berhujah poin tersebut memandangkan mereka tidak membangkitkannya sebagai alasan rayuan. Hujahan perayu-perayu adalah bahawa kesan penggabungan ss 8B(1) dan 8C Akta adalah untuk menyingkirkan bidang kuasa mahkamah untuk menyemak apa-apa tindakan yang dilakukan atau keputusan yang dibuat oleh Yang di-Pertuan Agong atau Menteri dalam menjalankan kuasa budi bicara mereka di bawah Akta (kecuali atas apa-apa soalan ketidakpatuhan prosedur) dan bahawa prosiding 'judicial review' akan termasuk 'any other suit, action or other legal proceedings relating to or arising out of any act or decision made by the Yang di-Pertuan Agong or the Minister in accordance with the Act'. Perayu-perayu berhujah bahawa tuntutan responden untuk ganti rugi bagi penahanan salah adalah mengikut peruntukan-peruntukan tersebut dan tidak boleh didengar oleh mahkamah. MR, walau bagaimanapun, memutuskan

bahawa dengan menggunapakai peraturan *ejusdem generis*, s 8B(1) hanya mementingkan cabaran langsung kepada kesahan perintah penahanan melalui prosiding 'judicial review' dan tidak menjejaskan tindakan untuk ganti rugi yang berbangkit daripada prosiding writ habeas corpus di mana penahanan diputuskan adalah menyalahi undang-undang dan tidak berperlembagaan.

Diputuskan, membenarkan rayuan dan mengenepikan keputusan dan perintah mahkamah bawahan:

(1) Prosiding dan juga keputusan dan perintah Mahkamah Tinggi dan MR adalah tak sah dan terbatal dan tidak menjejaskan dan tidak dibenarkan untuk dipertahankan (lihat perenggan 54).

(2) Atas pentafsiran betul ss 8B(1) dan 8C Akta, mahkamah tidak mempunyai bidang kuasa untuk mengaward ganti rugi bagi tort penahanan salah terhadap Menteri Hal Ehwal Dalam Negeri. Tuntutan responden bergantung ke atas dakwaan penahanan lanjutan yang salah atau menyalahi undang-undang berikutan perintah yang dikeluarkan oleh perayu kedua di bawah s 8(7) Akta. Kausa tindakan bagi tort penahanan salah jelas terangkum di bawah kategori prosiding yang dimulakan melalui 'any other suit, action or other legal proceedings relating to or arising out of any act or decision made by the Yang di-Pertuan Agong or the Minister in accordance with the Act' seperti yang diperuntukkan dalam defisnisi 'judicial review' di bawah s 8C(d) Akta. Tindakan atau keputusan yang diadukan juga terangkum di bawah kategori 'any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act' seperti yang diperuntukkan dalam s 8B(1) Akta. Atas perkataan-perkataan jelas s 8B(1), mahkamah tidak mempunyai bidang kuasa untuk mengendalikan tuntutan responden. Tindakan responden tidak berkaitan langsung dengan 'any question on compliance with any procedural requirement' di bawah Akta. Oleh itu, hujahan responden bahawa s 8B(1) hanya menangani cabaran langsung kepada kesahan perintah penahanan melalui semakan kehakiman, bukan tindakan untuk ganti rugi berbangkit daripada prosiding semakan kehakiman, gagal (lihat perenggan 51–53).

(3) Mahkamah mempunyai bidang kuasa untuk membenarkan soalan undang-undang dibangkitkan bagi kali pertama atas rayuan di mana ia melibatkan asas soalan bidang kuasa dan di mana kepentingan keadilan sangat diperlukan. Dalam kes ini, k 18(2) Kaedah-Kaedah Mahkamah Rayuan 1994 mengizinkan MR membenarkan perayu untuk membangkitkan bagi kali pertama poin baru yang tidak dibangkitkan di mahkamah bawahan, lebih lagi apabila poin yang dibangkitkan melibatkan bidang kuasa mahkamah untuk mengendalikan tuntutan responden terhadap perayu-perayu (lihat perenggan 18, 21, 27 & 53).]

Notes

For cases on Internal Security Act (Malaysia) in general, see 4(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1352–1359.

Cases referred to

Abdul Razak bin Baharudin & Ors v Ketua Polis Negara & Ors and another appeal [2006] 1 MLJ 320, FC (refd)

Attorney General for the Straits Settlements v Pang Ah Yew [1934] 1 MLJ 184; [1923] 1 LNS 1 (refd)

Banbury v Bank of Montreal [1918] AC 626, HL (refd)

Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345, FC (refd)

DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd & Anor [2002] 2 MLJ 11, FC (refd)

Government of the State of Sabah v Syarikat Raspand (suing as a firm) [2010] 5 MLJ 717; [2010] 7 CLJ 945, CA (folld)

Kerajaan Malaysia & Ors v Nasharuddin Nasir [2003] MLJU 841; [2004] 1 CLJ 81, FC (refd)

Kesultanan Pahang v Sathask Realty Sdn Bhd [1997] 2 MLJ 701; [1997] 2 CLJ 723, CA (refd)

Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] MLJU 667; [2005] 3 CLJ 914, FC (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, CA (refd)

Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72; [2002] 4 CLJ 105, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

Yong Mok Hin v United Malay States Sugar Industries Ltd [1967] 2 MLJ 9; [1967] 1 LNS 220, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 69(4)

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 11C(1), 11D

Emergency (Public Order and Prevention of Crime) Ordinance 1969 ss 7C(1), 7D

Federal Constitution arts 5(1), 151(1)

Immigration Act 1959/63 s 59A

Internal Security Act 1960 (repealed by Security Offences (Special Measures) Act 2012) ss 8(1), (7), 8B, 8B(1), 8C, 8C(d), 11, 12

Interpretation Acts 1948 and 1967 s 17A

Rules of the Court of Appeal r 18(1), (2)

Appeal from: Civil Appeal No W-01–401 of 2010 (Court of Appeal, Putrajaya)

Alice Loke Yee Ching (Nizam Shahrin with her) (Senior Federal Counsel, Attorney General's Chambers) for the appellants.
M Manoharan (M Manoharan & Co) for the respondent.

Ramly Ali FCJ (delivering judgment of the court):

[1] The factual matrix of the case is rather short and straightforward. The respondent was initially detained by an order dated 12 September 1991 issued by the Deputy Minister of Home Affairs under sub-s 8(1) of the Internal Security Act 1960 ('the ISA'). This initial order of detention was for a period of two years. Towards the end of the initial two year period, the Deputy Minister, on 11 September 1993, issued an extension order under sub-s 8(7) of the ISA, extending the period of detention for another two years with effect from 14 September 1993, (extension order).

[2] Aggrieved with the extension order, the respondent then applied for a writ of habeas corpus at the Penang High Court. He succeeded in his application. The High Court allowed his habeas corpus application on 7 September 1994 and the respondent was accordingly released. The appellants then filed an appeal against the said decision but later withdrew it. Thus the decision of the Penang High Court stands.

[3] Based on the decision of the Penang High Court allowing the respondent's application for habeas corpus and upon his release, the respondent brought an action in the Kuala Lumpur High Court for damages for the tort of false imprisonment in respect of the extended period of detention from 14 September 1993 until his period of release on 7 September 1994 which covers a period of approximately 300 days.

[4] The learned judge of the Kuala Lumpur High Court ruled in favour of the respondent, and awarded damages of RM3m as general damages together with RM300,000 for exemplary damages for the respondent.

[5] The appellants filed an appeal to the Court of Appeal against the said decision. The Court of Appeal affirmed the finding of the High Court and held that the extended detention of the respondent was unlawful, and unconstitutional, and therefore the appeal on liability was dismissed.

[6] On quantum of damages, the Court of Appeal set aside the award made by the High Court and substituted it with an award of RM300,000 as general damages with interest and costs in favour of the respondent. The Court of Appeal did not make any award for exemplary damages and set aside the award of exemplary damages by the High Court.

[7] Still not satisfied with the decision of the Court of Appeal, the appellants then filed an appeal to this court. Hence the present appeal before us.

THE PRESENT APPEAL

[8] The present appeal before us is against the decision of the Court of Appeal allowing the respondent's claim for false imprisonment and awarding a sum of RM300,000 as general damages in favour of the respondent.

[9] The appellants' application for leave to appeal to this court against the whole judgment and orders of the Court of Appeal was allowed on 9 September 2014 on the following questions of law:

(a) whether on the true construction of sub-s 8B(1) and s 8C of the Internal Security Act 1960 (Act 82), the court has jurisdiction to award damages for the tort of false imprisonment against the Minister of Home Affairs, ('question 1'); and

(b) whether the court has discretion in allowing or not allowing a question of law raised for the first time on appeal in view of the clear words of a statute ousting the jurisdiction of the courts in respect of a specific matter ('question 2').

[10] The issue of jurisdiction under sub-s 8B(1) and s 8C of the ISA as stated in the question 1 was only raised for the first time on appeal at the Court of Appeal, but not at the trial court. It relates to question 2 in that if question 2 is answered in the negative then question 1 would fall. However, if question 2 is answered in the affirmative, then we will need to deal with question 1. Thus, we will now deal with question 2 first.

Question 2: Whether courts have discretion to allow a question of law raised for the first time on appeal in view of the clear words of a statute ousting the jurisdiction of the courts in respect of a specific matter

[11] It is not in dispute that the issue relating to the courts' jurisdiction under sub-s 8B(1) and s 8C of the ISA was first raised during the appeal at the Court of Appeal. It is a jurisdictional issue. It was not raised at the High Court. It was not considered and not touched by the learned High Court judge in his judgment.

SUBMISSIONS BY SENIOR FEDERAL COUNSEL ON QUESTION 2

[12] The appellants submitted that 'an appellate court has the jurisdiction to entertain a new point not argued or raised at the court below if it raises a question of jurisdiction and if it would result in a rectification of an erroneous

order'. The appellants further submitted that 'in the instant case the defendants (appellants) are raising a jurisdiction issue in that sub-s 8B(1) and s 8C of the ISA oust the jurisdiction of the court to award damages for false imprisonment (as in the instant case). If this point succeeds, then the award of damages would be erroneous and has to be reversed'.

[13] The appellants also submitted that 'the new point raised is also a point of law which is not dependent upon any facts but existing provisions of them. The Court of Appeal was competent to entertain the point raised'. The court can also do so 'where the interest of justice so requires'.

SUBMISSIONS BY COUNSEL ON QUESTION 2

[14] The respondent objected to this attempt by the appellants on this point which was only raised at the Court of Appeal. The respondent's stand is that this issue was quite fundamental and should have been included as a ground of appeal based on the decision of the trial court.

[15] Learned counsel for the respondent however conceded that 'while it is true that the Court of Appeal can consider a point not expressly taken in the memorandum of appeal or argued in the court below based on the broad wording of sub-s 69(4) of the Courts of Judicature Act 1964 and r 18(2) of the Rules of the Court of Appeal 1994 ('the RCA'), this is subject to the overriding discretion of this court to do justice. Where the justice of the case requires a departure from the rule that parties should be bound by the grounds in the memorandum of appeal, the court may allow a new point to be argued'.

DECISION OF THE COURT OF APPEAL ON QUESTION 2

[16] The Court of Appeal accepted the respondent's submission on this point and noted that it was not pleaded as a ground of appeal in the memorandum of appeal nor was it argued in the court below. The Court of Appeal held that: 'The argument taken was quite fundamental and should have, at the very least, been included as a ground of appeal. The respondent was right in objecting to the attempt by the appellants to submit on this basis. In any event, we very much doubted whether the reading of s 8B(1), read in conjunction with s 8C, is correct. A straightforward application of the ejusdem generis rule would show s 8B(1) addresses only direct challenges to the validity of a detention order by 'judicial review'. It has little to do with a suit for damages arising from a 'judicial review' proceeding'. Consequently, the Court of Appeal dismissed the appellants' appeal on liability.

A OUR VIEW ON QUESTION 2

[17] Our view is that the courts have untrammelled discretion to allow a question of law to be raised for the first time on appeal. This is trite and well settled. The issue may be allowed to be ventilated at the appeal stage in the interest of justice having regard to the circumstances of the case and where it is appropriate to do so. As correctly said by Gopal Sri Ram (JCA) (as His Lordship then was) in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719: The categories of cases in which an appellate court will admit a new point not raised in the court below are not closed. The governing principle is that an appellate court will permit a new point to be raised for the first time before it where the interests of justice so require. The factors for and against the admission of the new point must be weighed on a balance to see where the justice of the case lies.

[18] The relevant provisions of law relating to this issue are to be found in sub-r 18(1) and (2) of the RCA which states:

> (1) The appellant shall prepare a memorandum of appeal setting forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided; such grounds to be numbered consecutively.
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> (2) The appellant shall not without the leave of the court put forward any other ground of objection, but the court in deciding the appeal shall not be confined to the grounds set forth by the appellant.

[19] Subrule 18(1) is clear. It sets out the general rule relating to the memorandum of appeal to be filed at the Court of Appeal in that it is a mandatory requirement for an appellant to prepare a memorandum of appeal, setting forth the grounds of appeal and specifying the points of law or fact alleged to have been wrongly decided by the court below.

[20] It is a settled general rule that points of law alleged entitling the party raising them to verdict or judgment must be made at the trial, and that if they are not then made, they cannot be raised afterwards at the appeal stage (see: *Banbury v Bank of Montreal* [1918] AC 626 at pp 659, 705 and 714 (HL)).

[21] Subrule 18(2) provides for the exception to the general rule. The court will allow a new point to be raised by the parties for the first time before it where the interests of justice so require. Interests of justice in any particular case depend on the peculiar facts of the case. The justice of a case will ordinarily lie in favour of allowing a point of law that goes to the jurisdiction of the court to be raised for the first time at the appellate stage. It can only be done with leave

of the court. The categories of cases that fall under the exception are not closed. A

[22] The scope of r 18(2) was clearly elaborated at length by Low Hop Bing JCA, in the case of *Government of the State of Sabah v Syarikat Raspand (suing as a firm)* [2010] 5 MLJ 717; [2010] 7 CLJ 945 (with which we agree) as follows: B

> The bone of contention is focused on r 18(2). It consists of two limbs viz:
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> (1) Under the first limb, an appellant is not at liberty to advance any other ground except those included in the memorandum of appeal. He may however obtain leave of the Court of Appeal to do so. It is abundantly clear to us that this rule of exclusion is not absolute, as the court is vested with the discretion to grant leave to enable the appellant to argue or advance the other relevant ground(s) which was (or were) not included in the memorandum of appeal; and C
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> (2) The second limb, which is even wider in scope than the first limb, declares that the court in deciding the appeal shall not be confined to the grounds set forth by the appellant. The court is therefore not legally bound to restrict the argument to the grounds contained in the memorandum of appeal. This second limb is consistent with the provisions of r 1A of the same Rules which expressly enacts, inter alia, that in administering any of these Rules, the court shall have regard to the justice of the particular case. D E

[23] The new point of law raised for the first time by the appellants at the Court of Appeal in the instant case relates to the ouster clause provisions of sub-s 8B(1) and s 8C of the ISA. It involves a question of jurisdiction of the courts. A new point of law on issue of jurisdiction was allowed to be taken for the first time at the appellate stage by the Court of Appeal in *Luggage Distributors (M) Sdn Bhd*. In that case, the Court of Appeal, speaking through Gopal Sri Ram JCA (later FCJ) made the following ruling (with which we agree): 'Similarly, justice would, in the usual way, favour the admission of a point that goes to the jurisdiction of the trial court because neither consent nor waiver may confer jurisdiction where none exists; and it is not in the interests of justice that a judgment of a court lacking jurisdiction should be permitted to stand'. F G H

[24] If the appellants' argument on the issue of jurisdiction in sub-s 8B(1) and s 8C of the ISA (as raised in question 1) is successful, the obvious consequence is that the whole proceeding in the instant case filed by the respondent as well as the awards made thereunder in favour of the respondent would fall and cannot be enforced at all. The whole proceeding was a nullity. I

[25] The same proposition was followed and adopted by Abdul Malek Ahmad JCA (later PCA) who delivered a dissenting judgment in *Kesultanan Pahang v Sathask Realty Sdn Bhd* [1997] 2 MLJ 701; [1997] 2 CLJ 723 in

which His Lordship invoked r 18(2) of the RCA and allowed the issue of jurisdiction to be argued in the Court of Appeal although it was not raised in the High Court. His Lordship held:

> Despite the fact that the issue of jurisdiction was not raised in the High Court, it does not prohibit the appellant from raising it at the appeal stage in view of r 18(2) of the Rules of the Court of Appeal 1994. All the relevant authorities on the point of both the superior courts in England and in this country had been considered and analysed in the *Syarikat* case in great detail and I can only conclude that the position has been correctly stated.

[26] The common law position on the issue is the same with the one provided for under sub-r 18(2) of the RCA. Mac Intyre J (as he then was) in *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9; [1967] 1 LNS 220 echoing the sentiment of the earlier authorities of *Attorney General for the Straits Settlements v Pang Ah Yew* [1934] 1 MLJ 184; [1923] 1 LNS 1 HC and *Banbury v Bank of Montreal* ruled as follows:

> Two points emerge from the observations of Lord Parker and Lord Wrenbury. They are, first, that a point of law could be taken up for the first time on appeal if it raised a question of jurisdiction; and, secondly, a Court of Appeal would entertain a point of law not raised in the court below if it would result in the rectification of an erroneous order.

[27] In view of the above considerations, the answer to question 2 should be in the affirmative, more so as in the instant case, where it involves a question of jurisdiction of the courts in dealing with the respondent's claim against the appellants. With that answer, we will now proceed to deal with question 1.

Question 1: Whether on a true construction of sub-8B(1) and s 8C of the ISA, the court has jurisdiction to award damages for the tort of false imprisonment against the Minister of Home Affairs?

[28] Question 1 revolves around the construction and interpretation of sub-s 8B(1) and s 8C of the ISA. Subsection 8B(1) reads:

> There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

[29] Section 8C reads:

> In this Act, 'judicial review' includes proceedings instituted by way of —

(a) an application for any of the prerogative orders of mandamus, prohibition and certiorari;

(b) an application for a declaration or an injunction;

(c) a writ of habeas corpus; and

(d) any other suit, action or other legal proceedings relating to or arising out of any act or decision made by the Yang di-Pertuan Agong or the Minister in accordance with this Act.

SUBMISSIONS BY SENIOR FEDERAL COUNSEL ON QUESTION 1

[30] Learned senior federal counsel, submitted that the provisions of sub-s 8B(1) and s 8C of the ISA clearly have the effect of ousting the jurisdiction of the courts if there is any challenge to the decision or act of the Minister except on the question of compliance with any procedural requirement in the ISA governing such act or decision.

[31] She further submitted that the effect of sub-s 8B(1) and s 8C is exclusionary in nature by way of legislative intervention, thus in effect, by virtue of para 8C(d), any action suit or other legal proceedings in relation to the Minister's act or decision under the ISA is excluded from the courts' jurisdiction including a suit for damages for false imprisonment.

[32] She also stressed that '… as the effect of subsection 8B(1) and section 8C is critical to the jurisdiction of the court, and would have consequence on the decision whether the plaintiff's claim can be allowed, the Court of Appeal ought to have exercised its discretion to allow the point to be argued'.

[33] It was also submitted that Parliament's intention in legislating the ouster clauses of sub-s 8B(1) and s 8C must be considered and given full effect notwithstanding the drastic implications of such effect. The legislative intent is paramount, and any construction to be given to a statute must accord with the collective will of the Legislature, taking into consideration the purpose of the Act. Therefore, upon a true construction or interpretation of sub-s 8B(1) and s 8C of the ISA, the court has no jurisdiction to hear the respondent's claim and to award damages for false imprisonment as claimed.

SUBMISSIONS BY COUNSEL ON QUESTION 1

[34] Learned counsel for the respondent, on the other hand, doubted very much whether the reading of sub-s 8B(1), read together with s 8C of the ISA as submitted by learned senior federal counsel is correct. Learned counsel supported the finding of the Court of Appeal that the *ejusdem generis* rule would apply and sub-s 8B(1) addresses only direct challenges to the validity of

a detention order by judicial review but not to a suit for damages arising from a judicial review proceeding, as in the instant case.

[35] Learned counsel contended that the doctrine of *ejusdem generis* should be applied in interpreting sub-s 8B(1) and s 8C — that the meaning to be given to the general words must be restricted to a sense analogous to that of the less general words.

DECISION OF THE COURT OF APPEAL ON QUESTION 1

[36] The Court of Appeal agreed with the finding of the learned High Court judge that by relying on the earlier habeas corpus decision of the Penang High Court, the extended detention was unlawful and unconstitutional. Therefore, the appeal on liability was dismissed. (In the earlier habeas corpus decision, the Penang High Court ruled that the failure on the part of the Deputy Minister to provide grounds and allegations for the extended detention which resulted in the continued detention of the respondent was in contravention of sub-s 8(7), ss 11 and 12 of the ISA as well as art 5 cl (1) and art 151 cl (1) of the Federal Constitution).

[37] On the issue of sub-s 8B(1) of the ISA, the Court of Appeal noted that it was not pleaded in the memorandum of appeal nor was it argued at the court below. At paras 27–31 of the judgment, the Court of Appeal expressed the following views:

> [27] In the course of submission before us, a new point was raised by the appellants. This referred to the effect of the exclusionary clause, s 8B(1) of the Internal Security Act, reading:
>
> > There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on the compliance with any procedural requirement in this Act governing such act or decision.
>
> [28] This was a point not pleaded in the memorandum of appeal. Nor was it argued in the High Court below. Before us, the appellants then attempted to argue that the courts have no jurisdiction to entertain any claim for damages for unlawful imprisonment or wrongful detention, since 'judicial review' is very broadly defined in s 8C of the same Act, to include proceedings instituted by way of:
>
> (a) mandamus, prohibition and certiorari;
>
> (b) declarations;
>
> (c) habeas corpus; and
>
> (d) any other suit, action or other legal proceedings relating to or arising out of any act done or decision made by the Minister.

[29] While it is true that the Court of Appeal can consider a point not expressly taken in the memorandum of appeal or argued in the court below based on the broad wording of s 69(4) of the Courts of Judicature Act 1964 and r 18(2) of the Rules of the Court of Appeal 1994, this is subject to the overriding discretion of this court to do justice. Where the justice of the case requires a departure from the rule that parties should be bound by the grounds in the Memorandum of Appeal, the court may allow a new point to be argued. See *Luggage Distributors (M) Sdn Bhd* ('The factors for and against the admission of the new point must be weighed on a balance to see where the justice of the case lie'). See also *Cheow Chew Khoon v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457; *Mohd Azam Shuja & Ors v United Malayan Banking Bhd* [1995] 2 MLJ 851 ('The question whether effect should be given to a point raised for the first time ... is one of discretion and the court can consider it in the interests of justice').

[30] The argument taken was quite fundamental and should have, at the very least, been included as a ground of appeal. The respondent was right in objecting to the attempt by the appellant to submit on this basis. In any event, we very much doubted whether the reading of s 8B(1), read in conjunction with s 8C, is correct. A straightforward application of the *ejusdem generis* rule would show s 8B(1) addresses only direct challenges to the validity of a detention order by 'judicial review'. It has little to do with a suit for damages arising from a 'judicial review' proceeding.

[31] Consequently, we found no merit in the submission taken on the effect of s 8B(1) and the attempt to preclude this court form exercising jurisdiction in this appeal.

[38] Apparently, the Court of Appeal refused to allow the ouster clauses of sub-s 8B(1) and s 8C of the ISA, as raised by the appellants, to be raised and argued for the first time before the court on the sole ground that it was quite a fundamental point and 'should have, at the very least, been included as a ground of appeal'.

OUR VIEW ON QUESTION 1

[39] The sole point in considering question 1 is the legal effect to be given to sub-s 8B(1) and s 8C of the ISA. It relates to the statutory construction and interpretation of the provisions and the determination of whether the wordings of those provisions effectively oust the jurisdiction of the courts to deal with the respondent's claim for false imprisonment in the instant case and to award damages in respect of the claim.

[40] Judicial review, which is essentially a creature of the common law, can be excluded by an Act of Parliament, if it is specifically provided for and the words used are unmistakably explicit. On this issue, Steve Shim CJ (Sabah and Sarawak) (delivering the judgment of the Federal Court) in *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81 in dealing

with the provisions of the same sub-s 8B(1) and s 8C of the ISA, had expressed the view that the court's jurisdiction to review under those provisions was ousted. The cardinal principle is that where the intention of Parliament is clearly expressed, the duty of the court is to give effect to that intention. The intention of Parliament is to be garnered from the wordings of the ouster clause.

[41] This court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 had clearly indicated to the effect that:

> It is clear law that appellate review jurisdiction is solely a creature of statute while supervisory review jurisdiction is the creature of the common law and is available in the exercise of the courts' inherent power but, I would hasten to add, its extent may be determined not merely by judicial development but also by legislative intervention.

[42] Subsection 8B(1) is clearly intended to exclude judicial review by the court of any act done or any decision made by the Minister in the exercise of his power in accordance with the ISA except as regards any question on non-compliance with any procedural requirement relating to the act or decision in question. The words in sub-s 8B(1) are explicit, clear and precise in ousting the jurisdiction of the courts.

[43] The ouster clauses in sub-s 8B(1) and s 8C restrict and limit the grounds upon which challenges to the Minister's exercise of discretion could be premised. The exercise of the Minister's discretion in issuing orders for detention cannot be questioned in courts of law except on issue of non-compliance with the procedural requirements. The ouster clauses are not unconstitutional (see: *Kerajaan Malaysia & ors v Nasharuddin bin Nasir*).

[44] Subsection 8B(1) and s 8C were incorporated into the ISA by the Internal Security (Amendment) Act 1989 which came into force on 24 August 1989. The ISA is a security law. The powers and discretion of the Minister of Home Affairs, particularly in issuing detention orders under sub-s 8(1) of the ISA, involve the security of the nation, and have been left entirely to the Minister or the Executive to decide, to the total exclusion of the court except on grounds of procedural non-compliance. The clear intention of Parliament in introducing those provisions into the ISA was clearly expressed by the then Prime Minister in tabling the amendments. The relevant parts of the speech are as follows:

> ... tujuan utama pindaan-pindaan ini dicadangkan adalah untuk menentukan bahawa perintah tahanan yang dibuat oleh Menteri yang memutuskan bahawa seseorang itu mengancam keselamatan negara tidak dipersoalkan di mahkamah. Ini adalah kerana kebelakangan ini, keputusan Menteri mengeluarkan perintah

tahanan telah kerap dicabar dan dipersoalkan di mahkamah. Sekiranya mahkamah dibiar menggantikan keputusan pihak kerajaan dengan keputusan mahkamah, ini bermakna seolah-olah tanggungjawab bagi keselamatan negara tidak lagi terletak kepada kerajaan tetapi sebaliknya telah dipertanggungjawabkan kepada mahkamah, yang sebenarnya bukanlah ahli dan pakar dalam bidang keselamatan.

Selain daripada itu, sekiranya keputusan Menteri dipersoalkan oleh Hakim atau mahkamah, adalah sukar untuk pihak kerajaan mempertahankan perintah tersebut kerana ada perkara-perkara yang rahsia yang bersangkutan dengan keselamatan negara yang tidak dapat didedahkan dalam mahkamah atas sebab-sebab kepentingan keselamatan negara dan juga berhubungan dengan negara-negera lain ...

Tuan-tuan Yang di-Pertua, berdasarkan kedudukan yang telah saya huraikan tadi, cadangan pindaan ini dibuat semata-mata untuk menentukan dengan jelas akan peranan dan bidang kuasa Menteri Dalam Negeri dan peranan dan bidang kuasa seorang Hakim mahkamah. Dengan ini, perintah-perintah tahanan yang dibuat oleh menteri tidak lagi boleh dipersoal atau dipertikaikan di mahkamah melainkan perkara-perkara yang menyentuh soal prosedur sekiranya peruntukan undang-undang tidak dipatuhi.

[45] The intention, object and purpose of enacting ss 8B and 8C of the ISA was clearly expressed in the speech of the Prime Minister as appeared in the Parliamentary Hansard. In interpreting the provisions of an Act of Parliament, the trend now is to adopt such a construction as will promote the legislative intent or purpose underlying the provisions. This purposive approach has been given statutory recognition for the courts to adopt by virtue of s 17A of the Interpretation Acts 1948 and 1967. The Federal Court in *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd & Anor* [2002] 2 MLJ 11; and *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 had adopted the purposive approach by making reference to the Parliamentary reports or Hansard as an aid to statutory interpretation in interpreting the provisions of Acts of Parliament. In that case, Haidar FCJ, in delivering the judgment of the court remarked: *It will give statutory force to the courts to look the policy speech of the Minister or the promoter of the Bill in Hansard for the purpose of an aid to the interpretation of statutes.*

[46] Section 8C defines 'judicial review'. In para s 8C(d),'judicial review' is defined for the purpose of the ISA to include proceedings instituted by way of 'any other suit, action or other legal proceedings relating to or arising out of any act or decision made by the Yang di-Pertuan Agong or the Minister in accordance with this Act'.

[47] The construction and effect of ss 8B and s 8C of the ISA were categorically decided by the Federal Court in the case of *Abdul Razak bin Baharudin & Ors v Ketua Polis Negara & Ors and another appeal* [2006] 1 MLJ 320 where Abdul Hamid Mohamad (FCJ) (later CJ) delivering the judgment

of the court ruled:

> We reiterate now that this court must give effect to the provisions of ss 8B, 8C and 8D. It means, inter alia, that an order of the Minister under s 8 may only be challenged on the ground of procedural non-compliance. However, the restriction does not apply to a detention by a police officer under s 73. Section 8B does not cover 'an act done or decision made' by a police officer as under s 73.

[48] Similar provisions can also be found in other Acts in this country. These provisions include s 59A of the Immigration Act 1959/63; sub-s 11C(1) and s 11D of the Dangerous Drugs (Special Preventive Measures) Act 1985 and sub-s 7C(1) and s 7D of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. These provisions have been interpreted by the Federal Court in a number of cases to have exclusionary effect on the jurisdiction of the courts. Parliament clearly intended those sections to be conclusive on the exclusion of judicial review under the respective Acts (see: *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72; [2002] 4 CLJ 105 and *Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] MLJU 667; [2005] 3 CLJ 914).

[49] In the instant case, the respondent, as the plaintiff at the High Court, claimed against the appellants for compensation or damages for false imprisonment as a result of an unlawful extended detention as ruled by the Penang High Court when his habeas corpus application was allowed on 7 September 1994. Upon his release, the respondent filed the present action at the Kuala Lumpur High Court. His action was based on the period of the extended detention from 14 September 1993–6 September 1994 which covered a period of approximately 300 days.

[50] The relevant parts of the respondent's amended statement of claim read as follows:

> 6. Melalui perintah bertarikh 12.9.1991, di bawah tangan defendan kedua, plaintiff telah ditahan di Tempat Tahanan Perlindungan, Kamunting, Taiping (selepas dari ini dirujuk sebagai pusat tahanan) untuk jangkamasa selama dua tahun dari 14.9.1991 di bawah peruntukan seksyen 8(1) Akta Keselamatan Dalam Negeri (selepas dari ini dirujuk sebagai Akta tersebut). Plaintif plid bahawa perintah tahanan tersebut adalah batal dan tak sah dan tidak mempunyai kesan atau efek.
>
> 7. Defendan kedua tanpa kuasa yang sah atau kuasa undang-undang atau kuasa telah melanjutkan jangkamasa tahanan plaintif melalui perintah di bawah tangannya bertarikh 11.9.1993 berkuat kuasa dari 14.9.1993 dengan maksud di bawah peruntukkan-peruntukkan seksyen 8(7) Akta tersebut. Defendan kedua seterusnya dalam kemungkiran seksyen 8(7) Akta tersebut telah di dalam perintah tersebut tidak menyatakan sama ada penahanan berterusan adalah atas sebab-sebab yang sama seperti dalam perintah yang dikeluarkan pada mulanya atau atas sebab-sebab yang berlainan dari perintah tersebut atau sebahagian dari sebab-sebab

adalah sama dan sebahagian atas sebab-sebab yang lain.

8. Melalui perintah bertarikh 7.9.1994 Mahkamah Tinggi Pulau Pinang telah membenarkan permohonan plaintif untuk satu perintah dalam bentuk habeas corpus dan plaintif telah dilepaskan dari tahanan.

9. Plaintif plid bahawa tahanan plaintif di peringkat awal dan penahanannya yang berterusan di bawah perintah bertarikh 12.9.1991 dan 11.9.1993, adalah tidak sah dan bercanggah dengan undang-undang dan tidak mengikut kuasa yang sah atau kuasa undang-undang.

15. Pada 7.9.1994, Mahkamah Tinggi Pulau Pinang memutuskan bahawa plaintif dibebaskan dari tahanan selepas mendapati keseluruhan tahanan dari 14.9.1991 sehingga 7.9.1994 adalah tidak sah di sisi undang-undang dan juga perintah tahanan dan perlanjutan perintah tahanan adalah tidak sah di sisi undang-undang sebab:

(a) Perintah tahanan dan perlanjutan perintah tahanan adalah cacat padah sebab ditandatangani oleh orang yang tidak layak ditandatangani;

(b) Semua alasan-alasan tahanan adalah tidak dinyatakan dan jika dinyatakan adalah tidak dibuktikan;

(c) Semua alasan-alasan tahanan adalah rekaan belaka; dan

(d) Tiada sebarang alasan dikemukakan bagi perlanjutan perintah tahanan tersebut.

16. Plaintif plid bahawa plaintif semasa tahanan bermula dari 14.9.1991 sehingga 7.9.1994 telah mengalami kesakitan, kehilangan, kerugian dan menuntut gantirugi di atas alasan-alasan berikut:

(a) Tiada sebarang rawatan perubatan asas diberikan kepada plaintif;

(b) Makan dan pemakanan adalah tidak setanding dengan makanan manusia biasa;

(c) Plaintif dinafikan hak pengetahuan am dengan tidak diberi sebarang buku-buku, majalah-majalah, surat khabar-surat khabar dan/atau material-material asas; dan

(d) Plaintif dinafikan hak lawatan oleh keluarga terdekat termasuk anak-anak kandungan plaintif."

22. Akibatnya dari tindakan-tindakan defendan-defendan, plaintif telah mengalami kehilangan dan kerugian.

23. Maka plaintif menuntut terhadap defendan-defendan untuk relief seperti berikut:

(i) Gantirugi untuk penahanan salah dari 14.9.1991 sehingga 7.9.1994;

(ii) Gantirugi teladan dan teruk; dan

(iii) Faedah ke atas amaun yang dihakimi.

[51] Looking at the above paragraphs in the amended statement of claim, it is very clear that the respondent was relying on the alleged wrongful or unlawful extended detention pursuant to an order dated 11 September 1993 issued by the Deputy Minister of Home Affairs under sub-s 8(7) of the ISA for a period of two years from 14 September 1993. The said order was declared unlawful and unconstitutional by the Penang High Court in the habeas corpus application by the respondent, which resulted in the respondent being released. The respondent's cause of action in this suit is under the tort of false imprisonment.

[52] The respondent's action clearly falls under the category of proceedings instituted by way of 'any other suit, action or other legal proceedings relating to or arising out of any act or decision made by the Yang di-Pertuan Agong or the Minister in accordance with the Act', as provided for in the definition of 'judicial review' under s 8C of the ISA. The act or decision complained of also falls under the category of 'any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act', as provided for in sub-s 8B(1) of the same Act. By clear words of sub-s 8B(1) of the ISA the court has no jurisdiction and cannot exercise any jurisdiction to deal with the respondent's claim. The respondent's present action has nothing to do with 'any question on compliance with any procedural requirement' under the ISA. Therefore, the submissions by learned counsel for the respondent that sub-s 8B(1) addresses only direct challenges to the validity of a detention order by judicial review, but not a suit for damages arising from a judicial review proceeding, must fall.

CONCLUSION

[53] Based on the above considerations, we answer question 1 in the negative: that on a true construction of sub-s 8B(1) and s 8C of the ISAs, the court has no jurisdiction to award damages for the tort of false imprisonment against the Minister of Home Affairs; and our answer to question 2 is in the affirmative: that courts have the discretion to allow a question of law raised for the first time on appeal where it involves the fundamental question of jurisdiction and where interests of justice so require.

[54] In view of the above answers, we hold that the proceedings as well as the decisions and orders of the High Court and the Court of Appeal are null and void and of no effect. They cannot be allowed to stand.

[55] In the upshot, we allow the appeal with no order as to costs. The decisions and orders of the courts below are set aside.

Appeal allowed; decisions and orders of courts below set aside.

Reported by Ashok Kumar